

LIBRARY
SUPREME COURT U.S.

Office Supreme Court U.S.
FILED
APR 30 1953
BAROLD E. WILLEY, Clerk

OS. 540 and 573

In the Supreme Court of the United States

October Term, 1952

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRY GRAY NUGENT

UNITED STATES OF AMERICA, *Petitioner*

v.

LESTER PACKER

On Writs of Certiorari to the United States Court of Appeals
for the Second Circuit.

REPLY BRIEF FOR THE UNITED STATES

In the Supreme Court of the United States

October Term, 1952

No. 540

UNITED STATES OF AMERICA, *Petitioner*

v.

HARRY GRAY NUGENT

No. 573

UNITED STATES OF AMERICA, *Petitioner*

v.

LESTER PACKER

On Writs of Certiorari to the United States Court of Appeals
for the Second Circuit.

REPLY BRIEF FOR THE UNITED STATES

In Point III of the respondents' brief, they contend that the judgments below should be affirmed irrespective of what conclusion this Court reaches with respect to disclosure of the confidential investigative reports. It is argued with respect to respondent Nugent that procedural irregularities other than the failure to make the F.B.I. reports available to him vitiated the proceedings as to him.

As to respondent Packer, it is contended that an erroneous rule of law was applied in concluding that his objections were not based upon religious training and belief. Finally, as to both respondents, it is contended that there was not sufficient evidence to justify the classification given in each case (Resp. br. pp. 156-181). We submit that these contentions are without merit.

Nugent. The respondent Nugent complains that he was misled by assurances given him by the hearing officer's secretary (in the hearing officer's absence) that the F.B.I. report was favorable to Nugent's claim, and that in reliance upon such assurance Nugent did not offer his minister as a witness at the hearing. Respondents state that "This turned out to be a pivotal point, because the hearing officer in his report stated that no one gave evidence that Nugent had adopted his views before the Korean situation" (Resp. br. pp. 157-158). In the first place, Nugent was not entitled to rely blindly upon any statements which may have been made by the hearing officer's secretary, at least without taking advantage of his later opportunity to obtain confirmation of such statements from the hearing officer himself. This is particularly true since Nugent was aware of his own prior inconsistent position in claiming exemption from combatant service only. In any event, there was already in the Selective Service file (NR. 42-43) a letter from Nugent's minister from which it could

be concluded that Nugent's views had progressed, as he claimed. Accordingly, it was proper for the Department of Justice, in formulating its recommendation that Nugent be exempted from combatant service only, to take in consideration, as it did, the fact that originally and with full awareness of what he was doing he had claimed exemption only from combatant service (NR. 23-24).

Nugent complained at the trial and again here that the hearing officer unduly restricted his testimony and even deleted relevant testimony from the record. (NR. 12; Br. 156). At the trial, when this objection was first raised, respondent on cross-examination was unable to give any specific instances where the alleged deletions had occurred (R. 16). Moreover, a reading of the transcript of the hearing (Govt. br., Appendix, 69-75) fails to reveal the deletion of significant portions of the testimony. The questions follow each other in a logical pattern, and the transcript read as a whole is coherent.

Nugent's complaint that the hearing officer refused to allow him to testify fully as to the development of his religious beliefs (Resp. br. p. 156) was elaborated in the district court to a complaint that the hearing officer would not hear argument consisting of quotations from the Bible (NR. 13, 16). However, Nugent's selective service file, which was before the hearing officer, already contained written statements by Nugent with copious Bib-

lical quotations (NR. 33-34; 39-40) and it is not even alleged that Nugent sought to add anything new.

Finally, Nugent asserts that the hearing officer erroneously and capriciously drew conclusions adverse to his claim from the F.B.I. investigatory report which the hearing officer's secretary allegedly had advised Nugent was favorable to his claim (Resp. br. pp. 158-163). Specifically, Nugent points to the statements in the hearing officer's report that,

"Registrant's belief seems to be a free and particularly easy belief and religion, calling for little effort and practically no sacrifice.

"As to his sincerity, the references he produced failed to make favorable impression, and most of them were conscientious objectors themselves or members of the same Bible Society.

"From the impressions gleaned as to this registrant, he is apparently shiftless, lazy, somewhat of a moral weakling—has unusual motion in walking, talking and other mannerisms which give him the appearance of being somewhat if not definitely effeminate.

"In all events, this registrant definitely has not qualified as a Conscientious Objector as to church affiliations, religious beliefs, or any statements or affirmative actions which were attested to by anyone on his behalf, made

prior to the national emergency, and it is believed that his present claims are not founded on truth in fact," (NR. 46-47)

However, the presence of irrelevant or erroneous conclusions in the hearing officer's report and recommendation cannot invalidate Nugent's classification because they were not accepted by the Department of Justice as the basis for its recommendation. The Department's recommendation, unlike the hearing examiner's report, accurately reflects the substance of the investigatory report that Nugent is sincerely interested in his religion. Thus, the Department's recommendation to the Selective Service appeal board concludes that (NR. 48):

The investigative report shows that the registrant is a religious person and attends church regularly. There is some indication in the report that the registrant is inclined to be lacking in ambition, however, his employment record is satisfactory. A number of persons interviewed, not members of the sect to which the registrant belongs, indicated that the registrant is a courteous, quiet, sober individual, who is sincerely interested in his religion. Registrant's claim for exemption from noncombatant service is not sustained because he failed to establish that because of his religious training and belief he is conscientiously op-

posed to participation in training and service in a noncombatant capacity. In this connection, attention is also invited to the registrant's statement regarding his classification, which appears on his SSS Form No. 100.

It is the Department's recommendation, not the hearing officer's report, which Section 6(j) of the Act requires the appeal board to consider. Irrelevant or erroneous conclusions in the hearing officer's report cannot invalidate a classification based upon the Department's recommendation, any more than erroneous findings of a hearing examiner employed by an administrative agency can invalidate an order which the agency issues after rejecting the findings of its examiner. Here, the Department's recommendation is supported by the substantial affirmative fact, quite apart from Nugent's burden of proof, that he first claimed exemption from combatant service only, which has been granted. Thus, the recommendation is supported by evidence within the rule of *Cox v. United States*, 332 U.S. 442, and *Estep v. United States*, 327 U.S. 114, 122. In any event, as we have pointed out in our main brief, the ultimate decision was made by the appeal board, which was free to follow or reject the Department's recommendation.

Packer. In respondent's brief, it is contended that he was erroneously classified 1-A because of "the arbitrary and capricious holding of the hear-

ing officer that since Packer was not a member of a religious sect or organization he could not be a conscientious objector" (Resp. br. pp. 163-175).

In support of this objection, Packer points to a sentence in the hearing officer's report,—“Registrant received religious training in a faith which is not opposed to military service and it is quite speculative to assume that such training forms the basis of unwillingness to participate in war in any form.” Assuming that this statement by the hearing officer warrants the conclusion which Packer would draw from it, it cannot invalidate Packer's classification because the Department's recommendation was based upon the conclusion, amply supported by evidence, that Packer's claim was “based upon philosophical or sociological grounds or upon a personal moral code,” rather than upon religious training and belief as Congress has required in Section 6(j) (PR. 75).

In Packer's classification questionnaire, filed in July 1949, he ignored Series XIV calling for a statement of the registrant's conscientious objections, if any (PR. 58), and he did not request the special form for conscientious objectors until October 1950, several months after the outbreak of fighting in Korea.¹ In reply to questions 2 and 3

¹ Packer now claims that he had not originally claimed conscientious objection because he did not expect to pass his physical examination and did not wish to “go looking for trouble.” (R. 43-46).

of the special form for conscientious objectors, Packer stated in part as follows (R. 64-65):

I do not know whether my code of morals will be considered of a religious nature although I believe in a Supreme Being. This code, however, may very well stem from this Supreme Being. I had received a brief religious training in my early years, such as the study of the ten commandments and religious prayer which has a definite moral significance. This training has probably had a definite bearing on my subconscious.

My training also includes that given me by my parents, such as moral behavior in relation to society. These moral codes to which I adhere, is, I believe, inherited in my nature as in other peoples nature. It is a part of this Super Natural force.

Perhaps my belief can best be stated in the words of Mencius the immortal Chinese philosopher when he said. Human nature is good * * *

During the hearing before the Department of Justice hearing officer, Packer stated that his answers to questions 2 and 3 of the special form "pretty well express" his views (PR. 44). We submit that Packer's own statements, even when read with his testimony before the hearing officer, amply support the recommendation of the Department of

Justice that Packer's conscientious objections were based "upon philosophical or sociological grounds or upon a personal moral code", rather than upon religious training and belief. They also support the decision of the appeal board that Packer should be classified 1-A.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

WARREN OLNEY III,
Assistant Attorney General.

ROBERT W. GINNANE,
*Special Assistant to the
Attorney General.*

BEATRICE ROSENBERG,
HOWARD ADLER, JR.,
Attorneys.

APRIL, 1953.